

STATE OF MICHIGAN
COURT OF APPEALS

SHARON REID and MARK REID,

Plaintiffs-Appellees,

v

CITY OF DETROIT,

Defendant-Appellant.

UNPUBLISHED

October 4, 2005

No. 254449

Wayne Circuit Court

LC No. 02-235159-CZ

Before: Bandstra, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right the trial court order granting partial summary disposition in favor of plaintiffs. We affirm in part, reverse in part, and remand for entry of an order granting summary disposition in favor of defendant on plaintiffs' claim that an unconstitutional taking occurred.

This case involves vacant property located at 4275 17th Street in Detroit owned by defendant. On November 5, 1999, a fire allegedly began on this property and spread to nearby buildings. Plaintiffs, the owners and tenants of a damaged building located at 4279 17th Street, filed suit seeking damages on the theory that defendant's failure to abate the fire hazard nuisance that existed at 4275 17th Street amounted to an inverse condemnation of the neighboring property under the Takings Clause of the Michigan Constitution.¹ Plaintiffs further asserted that defendant could not invoke the defense of governmental immunity because its primary purpose in owning 4275 17th Street was to produce a pecuniary profit. The trial court dismissed plaintiffs' claim that the proprietary function exception to the doctrine of governmental immunity applied and held that a trespass nuisance claim could not survive under the Governmental Tort Liability Act, MCL 691.1401 *et seq.* However, the trial court granted plaintiffs' motion for summary disposition regarding their inverse condemnation claim.

¹ The Takings Clause, Const 1963, art 10, § 2, provides: "Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record."

On appeal, defendant asserts that the trial court erred in denying its motion for summary disposition and in granting plaintiffs' motion on their Takings Clause claim because the uncontroverted evidence showed no deliberate or intentional acts by the city to appropriate or destroy plaintiffs' property for public use. We agree.

Under MCR 2.116(C)(10), summary disposition is appropriate when there is "no genuine issue as to any material fact." A question of material fact exists "when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). If a court determines that the opposing party, rather than the moving party, is entitled to judgment, it may "render judgment in favor of the opposing party." MCR 2.116(I)(2). See also *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999).

This Court's recent decision in *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537; 688 NW2d 550 (2004), resolves the issue presented in the instant case. In *Hinojosa*, the state acquired an abandoned house through tax delinquency proceedings. *Id.* at 538. After a fire damaged the building, the City of Detroit determined that it constituted an unsafe structure and scheduled it for demolition. *Id.* at 539. Before this could occur, a second fire originating in the building damaged adjacent homes owned by the plaintiffs. *Id.* The plaintiffs filed a two-count suit alleging trespass-nuisance and an unconstitutional taking or inverse condemnation. *Id.* at 540. At a hearing on the defendant's motion for summary disposition, the plaintiffs conceded that their trespass-nuisance claim was barred on the basis of governmental immunity. See *Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002).² *Id.* The trial court then granted summary disposition in favor of the defendant on the inverse condemnation claim on the grounds that the plaintiffs' complaint failed to allege an overt activity on the part of the defendant that interfered with the plaintiffs' enjoyment of their property. *Hinojosa, supra* at 540. On appeal, this Court noted that in order to establish an inverse condemnation, a plaintiff must prove that (1) "the government's actions were a substantial cause of the decline of his property's value" and (2) that "the government abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property." *Id.* at 548, quoting *Heinrich v City of Detroit*, 90 Mich App 692, 700; 282 NW2d 448 (1979). This Court then held that because the complaint failed to allege any "affirmative action by the state directed at plaintiffs' properties," the trial court properly granted defendant's motion for summary disposition under MCR 2.116(C)(8). *Hinojosa, supra* at 548, 550.

Like the plaintiffs in *Hinojosa*, plaintiffs in this case do not allege that defendant took any affirmative action directed at their property. Rather, plaintiffs assert that their property suffered damage due to city's failure to act and abate the dangerous conditions in existence at 4275 17th Street. As noted in *Hinojosa*, such a claim amounts to no more than "alleged negligent failure to

² In *Pohutski, supra* at 689-690, our Supreme Court held that the plain language of the governmental tort liability act, MCL 691.1401 *et seq.*, does not contain a trespass-nuisance exception to governmental immunity.

abate a nuisance” and is therefore barred by governmental immunity. *Id.* at 548. Consequently, we find that the trial court erred in granting summary disposition in favor of plaintiffs on their inverse condemnation claim.

We affirm the trial court order to the extent that it found the proprietary function exception to the doctrine of governmental immunity inapplicable and held that the governmental tort liability act barred a trespass-nuisance claim. But we reverse the trial court’s grant of summary disposition in favor of plaintiffs on their claim under the Takings Clause and remand for entry of an order granting summary disposition in favor of defendant on this issue.

We affirm in part, reverse in part, and remand for entry of an order granting summary disposition in favor of defendant.³ We do not retain jurisdiction.

/s/ Richard A. Bandstra

/s/ Janet T. Neff

/s/ Pat M. Donofrio

³ Because our decision regarding plaintiffs’ claim under the Takings Clause results in the dismissal of all claims against defendant, we do not consider defendant’s alternative claim that a genuine issue of material facts exists as to whether the fire actually originated on city owned property.